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In the
Supreme Court of the United States
OCTOBER TERM, 1969

Nos. 41 and 59

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

The respondents herein present their petition for a rehearing of the above-entitled cause and in support thereof respectfully show:

I.

The majority here overlooked the critical distinction between the law governing navigable water beds and the law governing non-navigable water beds. The decision in Brewer-Elliott upon which the majority opinion placed heavy reliance patently was not based on "essentially similar" facts—and the Court there expressly refused to pass upon the questions presented here.

The majority opinion relied heavily upon *Brewer-Elliott Oil & Gas Co., et al.* v. *United States, et al.*, 260 U.S.

77, 67 L.Ed. 140 (1922). The Court said: "The facts involved in *Brewer-Elliott* were essentially similar to those of the present case." The *Brewer-Elliott* case involved the title to the bed of the Arkansas River where it bounded the Osage Reservation, many miles above the portion of the river with which we are concerned. The Oklahoma Supreme Court in the *Nolegs* case had held that section of the river was navigable. The Supreme Court in the *Brewer-Elliott* case held that section of the river (unlike the lower portion of the river here involved) was *not* navigable and that it was not bound by the Oklahoma Supreme Court decision. The reservation for the Osage Indians was bounded on one side by the "main channel of the Arkansas River." Because the Arkansas at that point was a *non-navigable stream,* the riparian owner took title to the center of the stream even if there had been no reference to the main channel. The *Brewer-Elliott* case thus has no bearing upon the title to the *navigable* water beds with which we are concerned. The Court in *Brewer-Elliott* did, however, mention questions which would arise if the river were navigable, although expressly disclaiming any intention of passing upon those questions. The Court said:

> "*If the Arkansas river were navigable* in fact at the locus in quo, the unrestricted power of the United States, when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the circuit court of appeals, would be before us for consideration. If that could not be sustained, *a second question* would arise, whether vesting ownership of the river bed in the Osages was for 'a public purpose appropriate to the objects for which the United States hold territory,' within the language of Mr. Justice Gray in *Shively* v. *Bowlby,* above quoted.

"We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river-bed lots here in controversy are.

* * * * * * *

"Voluminous testimony was introduced in the district court upon the issue of navigability. That court considered it all with evident care, and had no difficulty in reaching the conclusion that the Arkansas river, along the Osage Reservation, was not, and had never been, navigable within the adjudged meaning of that term, and that the head of navigation is and was the mouth of the Grand river, near which was Fort Gibson, and this is a number of miles below the Reservation. The circuit court of appeals reviewed this finding and fully concurred in its correctness. Neither the argument nor the record, discloses any ground which can overcome the weight which the findings of two courts must have with us.

"It is a natural inference that *Congress*, in its grant to the Osage Indians in 1872, *made it extend to the main channel of the river, only because it knew it was not navigable.*" (Emphasis ours.)

Thus we see from the Court's language in *Brewer-Elliott* that the facts in that case were not "essentially similar," but really were fundamentally different and consequently reliance upon *Brewer-Elliott* in the majority opinion is misplaced. The reasoning in the majority opinion, therefore, is based upon a false premise and does not support the conclusions which were reached.

II.

The majority's conclusion that "The United States can dispose of lands underlying navigable waters just as it can dispose of other public lands" is contrary to and overrules Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331 (1893), and all other pertinent previous and subsequent decisions. Its effect is to reduce the sovereign State of Oklahoma to an unequal and inferior status in relation to her forty-nine sister states.

The conclusion of the majority of the Court obviously is based upon a premise stated on page 13 of its opinion, "Indeed it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands." Where such law has been settled we are unable to determine. This is preceded by a quotation of some loose language by the Court of Appeals in the *Brewer-Elliott* case which is negatived by this Court's refusal in that case to pass on questions concerning navigable water bottoms, as it concluded the stretch of the river with which it was concerned was non-navigable.

In fact, the "well settled" law—at least previous to the present case—was that navigable water bottoms were not acquired by the United States under the Constitution, and that in the territories the United States held the water bottoms in trust for future states, *Pollard* v. *Hagan*, 3 How. 212, 11 L.Ed. 565 (1845); *Martin* v. *The Lessee of Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1842). Under the standards of public policy as analyzed in *Shively* v. *Bowlby*, the United States could *not* dispose of navigable water beds, "just as it can dispose of other public lands," but it could dispose of navigable water beds *only in the case of some international duty or public exigency*. In that case the Court said

Congress had the power to make grants of land below high water mark of navigable waters in any territory *whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory.* The objects for which the United States holds the territory were defined in *Shively* v. *Bowlby* as follows:

> "And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held *with the object*, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects: and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.'"

Shively v. *Bowlby* is followed by numerous other decisions on the subject.

This Court has in effect overruled *Shively* v. *Bowlby* since it concludes that the United States can dispose of lands under navigable waters just as it can dispose of other public lands.

III.

The majority's holding as to title to the river bed is completely in conflict with its own finding as shown in the following quotation from its opinion: "Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed."

The above language from the majority opinion should have impelled a decision in favor of the respondents. The public policy of the United States as expressed in the applicable laws and in the decisions of this Court is simply this: The beds of navigable waters during the territorial period are not owned by the United States, but are held in trust for future states. The conveyance of the beds of these waters by the United States will be made only for some compelling reason outweighing this public policy and then only by specific grant clearly stated. *A patent from the United States embracing the navigable water beds does not convey those beds unless it says so in explicit, unmistakable language.* No reservation of the navigable water beds is required to preserve this trust imposed upon the United States for the benefit of all of the people of the United States and of the future states.

To avoid this public policy, the majority of the Court invokes the "Indian Rule" of construction and says that it can infer from the general language of the grants that the navigable water beds are included because of the Indian Rule. We submit that a careful reading of the Indian Rule of construction does not sustain its application here.

The majority invoked as authority *Jones* v. *Meehan*, 175 U.S. 1 (1899), but it failed to consider the full sig-

nificance of that case as explained by Mr. Justice Harlan in *United States* v. *Choctaw Nation*, 179 U.S. 494, 532, 45 L.Ed. 291 (1900), where he said:

> "In *Jones* v. *Meehan*, 175 U.S. 1, 11, 44 L.Ed. 49, 54, 20 Sup. Ct. Rep. 1, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.
>
> "*But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.* It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government.
>
> * * * * * * *
>
> "What was said in *The Amiable Isabella*, 6 Wheat. 1, 71, 72, 5 L.ed. 191, 208, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: 'In the first place, *this court does not possess any treaty-making power.* That power belongs by the Constitution to another department of the government, and *to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.* It would be to make, and not to construe, a treaty. *Neither can this court supply a casus omissus in a treaty, any more than in a law.* We are to find out the intention of the parties by just rules of interpretation applied to

> the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind . . ." (Emphasis ours.)

See also *Choctaw Nation* v. *United States,* 318 U.S. 423, 432, 87 L.Ed. 877 (1943) and *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U.S. 335, 353, 89 L.Ed. 985 (1945).

The majority, in this case, has done that which this Court has always said it would not do. The political contracts between the parties are being re-written. Language is being inserted in the treaties and patents which were never contemplated by the parties, whether United States or Indian. A transfer of the title to navigable water beds is now, at this late date, inserted in the total absence of any clearly expressed intent to do so on the part of the United States. Nowhere, in any of the treaties, or in any of the grants, is there any expression of an intent on the part of the United States to divest itself of the title to these navigable waters.

In their search to find some ground to justify the evasion of the long-standing, historic policy of our government (as proclaimed by statutory and case law) that navigable waters and their beds shall, except in very exceptional instances, be public property, the Justices who joined in the majority opinion have overlooked the most direct and only language of the treaties and patents issued thereunder revealing any expressed intention regarding the navigable portion of the Arkansas River. That language is in the Treaty of Dancing Rabbit Creek (7 Stat. 333, Article XI) and is as follows:

"Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U.S."

How can the majority opinion fail to comment upon, even in passing, the fact that the Choctaws, by treaty, were not to be required to pay any higher toll for use of the river than any others? To whom were the tolls to be paid by the Choctaws—to the Choctaws as owners of the river?

IV.

The good intentions of those joining in the majority opinion will not be served by the results of that opinion.

The majority opinion has taken a settled public policy on navigable water beds, grounded in the common law of England, and of the Colonies, and of the United States, and in the early statutory law, long preceding the treaties considered here, and has:

(1) Established a broad, loose construction rule of public grants so far as they pertain to navigable waters, which will haunt the Federal Government and the State Governments from this day forward;

(2) Established the Indian Tribes in a preferred category, which gives them "special rights," as against the public rights of Oklahoma and of the United States, of which they are citizens; and

(3) Opened the door for long and costly litigation between (a) the Cherokees on the one hand, and the Choctaws and Chickasaws, on the other, and possibly also between the Choctaws and the Chickasaws; (b) the prevailing Indian Tribe, or Tribes, and their respective riparian

allottees, or the grantees or assignees of those allottees. (Investigation has disclosed that few of these lands riparian to the Arkansas River now are owned by the Tribes or by individual Indian allottees, or their heirs, or devisees, so the struggle will be largely between the Indian Tribe or Tribes which granted away all of their right, title and interest in this riparian land, with no reservation of the bed of the river, and the present-day grantees of whatever racial stock they may be.)

The State of Oklahoma, since statehood in 1907, has invested revenues derived from leasing the bed of the Arkansas River for the benefit of the common schools of the entire state (not merely for the benefit of two or three Indian Tribes). The children of nearly 40 Indian Tribes now resident within the borders of the State, including the Cherokees, Choctaws and Chickasaws, participate in the benefits of this fund.[1] All are treated equally, whether majority group, or minority group, and without inquiry into their origin. Over 90 per cent of the Indian children in the State of Oklahoma attend the public schools maintained by the State. There are no schools maintained by the Tribes, and very few maintained by the United States, through the Bureau of Indian Affairs, for the education of these Indian children. Nor is there any assurance thus far that any of these Tribes will take any steps to offset this loss to their children, as far as education is concerned. So

[1] Even by 1866, the Quapaw, Peoria, Ottawa, Shawnee, Modoc, Wyandot, Seneca, Osage, Pawnee, Oto, Missouri, Kaw, Tonkawa, Sauk and Fox, Iowa, Kickapoo, Pottawatomie, Cheyenne, Arapaho, Wichita, Caddo, Comanche, Kiowa, Apache, and the Seminole and Creek Indians of the Five Civilized Tribes were settled in what is now Oklahoma, Muriel H. Wright, "A Guide to the Indian Tribes of Oklahoma," page 16.

far as we have been able to ascertain, no part of the huge sums of money the Tribes have recovered to date from the United States for alleged past wrongdoings has been spent to educate their children. Such funds have consistently been distributed to the members of the Tribes on a per capita basis pursuant to Acts of Congress.

The Cherokee, Choctaw and Chickasaw Tribes entered into treaties of allegiance with the Confederate States of America and actively participated on their side in the Civil War. As a result of that action subsequent treaties and agreements brought about considerable modification with respect to their rights and properties, and they were forced to free their slaves.

By the Act of March 3, 1893, 27 Stat. L. 645, Congress created a commission for the purpose of causing the Cherokees, Chickasaws, and Choctaws to relinquish tribal rights and to accept allotment of their lands in severalty to tribal members with the ultimate object of including said lands in a state.[2] The result of this Act and ensuing Acts of Congress were agreements with the Cherokees, 32 Stat. L. 716, and with the Choctaws, and Chickasaws, 30 Stat. L. 495 and 32 Stat. L. 641, which required allotment of the lands to individual members of the respective tribes and relinquishment of the general powers of the tribal governments. These agreements were followed by the Act of April 28, 1904, 33 Stat. L. 573, which supplanted the tribal laws; and the Act of April 26, 1906, 34 Stat. L. 137, continuing tribal governments for limited purposes pending termination at some future time, and for regulation of tribal af-

[2] See "Oklahoma Indian Land Titles" by W. F. Semple, Chap. II and United States Interior Dept., Federal Indian Law 994-999 (1958).

fairs under the Interior Department. The Cherokees and the Choctaws and Chickasaws became citizens of the United States as a result of these Congressional Acts. As citizens of the Territory they voted with other citizens in the elections concerned with admission of Oklahoma to the Union.

It was not until the allotment of the tribal lands in this century to individal members that any fee simple absolute title was acquired by these Indians.

No one questions that the waters under consideration here have been navigable since before the time the instant treaties were entered. Since 1796, as pointed out by the minority opinion, it has been the policy of the United States to reserve the title to navigable waters for the benefit of all the citizens, regardless of their color or creed.

There is no question that the United States had the *power* to dispose of these navigable waters, under the limited circumstances defined in *Shively* v. *Bowlby*, if it saw fit to do so, but the invariable rule has been that such a disposition of the publicly-owned navigable waters would never be presumed; that it must be clearly and unequivocally stated in the grant, to be effective.

The majority states that only the purest of "legal fictions" can be found that a future state was planned in this area. Here again, the majority has overlooked the historical background and legislation from the beginning of the American government up to statehood in 1907.[3]

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[3] Report No. 736, House of Representatives, dated June 27, 1848. Appendix 8 of Respondents' Brief on the merits. Also the statement of Commissioner Schermerhorn to the Cherokees at the Cherokee Treaty Ground in 1835 "that the time will yet come when an Indian state will be added to our Federal Union."

CONCLUSION

The opinions of this Court delivered April 27, 1970, are divided four to three. We file this petition in the earnest belief that at least one Justice who joined in the majority opinion of the seven-man Court will now join the three dissenting Justices to grant the rehearing which we ask.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that the judgment of the Court of Appeals of the Tenth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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MAY, 1970